

STATE OF MICHIGAN  
COURT OF APPEALS

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REBECCA SUE MOLNAR,

Plaintiff-Appellant,

v

MARK EDWARD MOLNAR,

Defendant-Appellee.

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UNPUBLISHED

April 26, 2007

No. 265664

Jackson Circuit Court

LC No. 04-005910-DO

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the property division set forth in the parties' judgment of divorce, specifically the provision dividing defendant's 401k account. We reverse in part, and remand.

Plaintiff argues that the trial court miscalculated defendant's premarital interest in his 401k, thereby causing an inequitable property division. We agree. When reviewing property distribution cases, this Court examines the trial court's factual findings for clear error and then determines whether the distribution was fair. *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). This Court will reverse for clear error when, although the lower court's findings have evidence to support them, the Court "is left with a definite and firm conviction that a mistake has been made." *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002), quoting *Tuttle v Highway Department*, 397 Mich 44, 46; 243 NW2d 244 (1976).

Plaintiff contends that the trial court committed clear error by failing to subtract the amount awarded to defendant's first ex-wife by a Qualified Domestic Relations Order (QDRO) from the 401k balance at the time of the parties' marriage when it calculated defendant's premarital interest in the 401k account. Before attempting to divide the parties' property, the court must first decide which assets are marital and which are separate. *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). It is generally presumed that all property and debt accumulated during the marriage is marital. *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds *Booth v Booth*, 194 Mich App 284 (1992). In *Lesko, supra* at 401, this Court recognized that trial courts have the power to determine whether debts are joint debts or are the individual responsibility of one party and, if so, to assign them to the party who incurred the debt.

In this case, defendant's obligation to pay his first ex-wife a portion of his 401k is equivalent to more traditional premarital debts, such as mortgages or the outstanding loan balance defendant carried against his 401k when he married plaintiff. The trial court subtracted the loan balance from the 401k's initial balance to arrive at defendant's premarital interest because defendant no longer had a right to the amount of the loan balance in the 401k. The same reasoning should have been applied to defendant's ex-wife's share, as ordered by the QDRO. On the date the QDRO was entered, defendant no longer had a right to the amount awarded to his ex-wife. Thus, it was not part of his premarital interest in the 401k funds. The fact that the ex-wife did not withdraw her money until after the current parties were married is of no consequence because, for all intents and purposes, her share no longer belonged to defendant. Therefore, we find that the trial court erred by refusing to subtract the first ex-wife's share of defendant's 401k when calculating defendant's premarital interest in his 401k.

As a result of this error, the marital portion of the 401k was reduced considerably when the first ex-wife withdrew her share during the marriage. Plaintiff was essentially forced to pay defendant's ex-wife \$4,045.50 because her share of defendant's pension was reduced by that amount. This result is unfair, as plaintiff was not a party to the obligation nor could this obligation ever be considered marital. Given that defendant's obligation to his ex-wife was clearly premarital, it should be considered a separate debt, chargeable to defendant. Failure to do otherwise would result in an unfair property distribution.

We remand to the trial court to adjust defendant's premarital portion of the 401k to \$11,321.89, recalculate the marital share to equal \$16,246.68, and award plaintiff an additional \$4,045.91 from defendant's 401k.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood